Supreme Court, U.S.
FILED

951041 DEC 27

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES S. LUDLUM
Counsel of Record for
Petitioners
ANTHONY G. BROCATO, JR.
LUDLUM & LUDLUM
13915 Burnet Road
Second Floor
Austin, Texas 78728
(512) 255-4000

29 pp

QUESTION PRESENTED FOR REVIEW

In a 42 U.S.C. § 1983 suit against public officials in their individual capacities, must a plaintiff still satisfy the heightened pleading requirement prior to a filed answer and discovery by (1) pleading with factual specificity and (2) pleading in anticipation of the officials' qualified immunity defense?

PARTIES TO THE PROCEEDING

The petitioners are Araceli Reyes, Sylvia Garza, Jose De Leon, and Dolores Salinas. The respondent is Roberto Lugo.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The names of all parties to the proceedings before the United States Court Of Appeals For The Fifth Circuit are as follows:

(1) Araceli Reyes, who was a Commissioner of the Board of Housing Authority of the City of Donna, Hidalgo County, Texas, and who is a Petitioner (Appellant in the Fifth Circuit).

(2) Sylvia Garza, who was a Commissioner of the Board of Housing Authority of the City of Donna, Hidalgo County, Texas, and who is a Petitioner (Appellant in the Fifth Circuit).

(3) Jose De Leon, who was a Commissioner of the Board of Housing Authority of the City of Donna, Hidalgo County, Texas, and who is a Petitioner (Appellant in the Fifth Circuit).

(4) Dolores Salinas, who was a Commissioner of the Board of Housing Authority of the City of Donna, Hidalgo County, Texas, and who is a Petitioner (Appellant in the Fifth Circuit).

(5) Roberto Lugo, Respondent (Appellee in the Fifth Circuit).

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

PARTIES TO THE PROCEEDING..... ii

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS..... ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... iv

OPINIONS BY OTHER COURTS IN THIS CASE..... 1

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS..... 2

STATEMENT OF THE CASE..... 4

ARGUMENT..... 10

CONCLUSION..... 22

APPENDIX (BOUND IN SEPARATE VOLUME)

TABLE OF AUTHORITIES

Cases	Page
Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991)	10
Brown v. Frey, 889 F.2d 159 (8th Cir. 1989), cert. denied, 493 U.S. 1088 (1990)	10
Butz v. Economou, 438 U.S. 478 (1978)	12, 13, 15
Chapman v. City Of Detroit, 808 F.2d 459 (6th Cir. 1986)	11
Coughlin v. Lee, 946 F.2d 1152 (5th Cir. 1991)	18
Dunbar Corp. v. Lindsey, 905 F.2d 754, (4th Cir. 1990)	11
Elliott v. Perez, 751 F.2d 472 (5th Cir. 1985)	9, 14, 18
Elliott v. Thomas, 937 F.2d 338 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992)	11
Harlow v. Fitzgerald, 457 U.S. 800 (1982).	13, 14, 15, 16, 17, 18, 20, 21
Hunter v. District Of Columbia, 943 F.2d 69 (D.C. Cir. 1991)	10
Jacquez v. Procunier, 801 F.2d 789 (5th Cir. 1986)	14
Krohn v. United States, 742 F.2d 24 (1st Cir. 1984)	11

TABLE OF AUTHORITIES - Continued

Leatherman v. Tarrant County Narcotics Intelligence & Coordination, 113 S.Ct. 1160 (1993)..... 11, 14

Mitchell v. Forsyth, 472 U.S. 511 (1985)..... 15, 17

Oladeinde v. City Of Birmingham, 963 F.2d 1481, (11th Cir. 1992), cert. denied, 113 S.Ct. 1586..... 10

San Jacinto Savings & Loan v. Kacal, 928 F.2d 697 (5th Cir. 1991)..... 19

Sawyer v. County Of Creek, 908 F.2d 663 (10th Cir. 1990)..... 10

Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995) (en banc)..... 9, 10, 11, 17, 19

Siegert v. Gilley, 500 U.S. 226, (1991)..... 16

Soderstrum v. Town Of Grand Isle, 925 F.2d 135 (5th Cir. 1991)..... 19

TABLE OF AUTHORITIES - Continued

Statutes, Rules and Congressional Materials

28 U.S.C. §1254(1)..... 2
28 U.S.C. §1291..... 2, 9
42 U.S.C. §1983.... i, 3, 7, 10, 11, 12, 13, 14, 15, 20, 21
F.R.A.P. 4(a)..... 9
Fed.R.Civ.P. 8..... 13
Fed.R.Civ.P. 12(b)(6)..... 2, 5, 9, 10, 18, 21
Fed.R.Civ.P. 12(b)(7)..... 5
U.S. Const. amend. I..... 3
U.S. Const. amend. XIV, §1..... 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BY OTHER COURTS IN THIS CASE

The opinions by other Courts in this case have not been published and are not reported in the official and unofficial reports. However, these opinions are listed in the Appendix as set forth below:

(1) The opinion of the United States Court Of Appeals For The Fifth Circuit.[1] See, Roberto Lugo v. The Housing Authority Of The City Of Donna, Hidalgo County, Texas, Et Al, No. 94-60743 (5th Cir. Unpublished Opinion, September 28, 1995) [Appendix A].

---

[1]Sometimes hereinafter referred to as "Fifth Circuit."

(2) The Minutes Of Hearing of the United States District Court, Southern District Of Texas, McAllen Division, Hon. Judge Ricardo H. Hinojosa. See, Robert Lugo v. The Housing Authority Of The City Of Donna, Hidalgo County, Texas, Et Al, Civil Action No. M-93-260 (S.D. Tex. October 7, 1994) [Appendix B].

JURISDICTION OF THIS COURT

i. The judgment of the United States Court Of Appeals For The Fifth Circuit was entered on September 28, 1995.

ii. The statutory provision believed to confer on this Court jurisdiction to review the judgment of the United States Court Of Appeals For The Fifth Circuit by writ of certiorari is 28 U.S.C. § 1254(1). This is a petition for writ of certiorari to review a case in the Fifth Circuit after rendition of the Fifth Circuit's judgment. The Fifth Circuit's judgment dismissed an interlocutory appeal of the Petitioners pursuant to 28 U.S.C. § 1291 after the United States District Court For The Southern District Of Texas, McAllen Division, denied their motion to dismiss under Fed.R.Civ.P. 12(b)(6).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this case are as follows:

> (1) "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,

any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1983.

(2) "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. amend. I.

(3) "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

On November 3, 1993, Roberto Lugo[2] filed a lawsuit [Appendix C] in a State District Court of Hidalgo County, Texas, in which he asserted state and federal claims against Petitioners, Araceli Reyes, Sylvia Garza, Jose De Leon, and Dolores Salinas,[3] who at all relevant times were all Commissioners of a governmental entity, the Housing Authority of the City of Donna, Hidalgo County, Texas,[4] which was also included as a named defendant. In the lawsuit, Lugo also sued, on similar grounds, the City of Donna and its City Council officials, Ernest E. Allison, Esmeralda Ramirez, and Adan Hernandez.[5] Lugo claimed that he was wrongfully discharged from his position as Executive Director and Secretary of the Housing Authority, a position that he held from March 23, 1992, until December 2, 1992.

Immediately after the filing of the lawsuit, Petitioners and the other defendants removed the case to the United States

---

[2]Hereinafter also referred to as simply "Lugo" or "Respondent."

[3]Hereinafter also referred to as simply "Reyes," "S. Garza," "De Leon," "Salinas," "Housing Authority officials," or "Petitioners."

[4]Hereinafter also referred to as simply "Housing Authority." Although a Defendant, the Housing Authority is not a Petitioner.

[5]Hereinafter also referred to as "the City," "Allison," "Ramirez," and "Hernandez." These Defendants are not Petitioners and are not represented in this case by the undersigned.

District Court, Southern District of Texas, McAllen Division [R.I. 1-36] and each filed a motion to dismiss.[6] Petitioners' motion and brief, filed pursuant to Rule 12(b)(6) and 12(b)(7), Fed.R.Civ.P., specifically pointed out that, with respect to all federal claims asserted in the lawsuit, Lugo failed to comply with the Fifth Circuit's "heightened" standard of pleading by (1) failing to show personal involvement of each of the Petitioners; (2) failing to state a constitutional claim against Petitioners, and (3) failing to state with factual detail and particularity the basis for the federal claims, including why the defendant-officials could not successfully maintain the defense of qualified immunity. [Appendix D and Appendix E].

After the District Court held an initial hearing on the matter, on March 4, 1994, Lugo submitted for filing his response to Petitioners' motion, taking the position that his pleadings had satisfied the heightened pleading requirement and had stated facts to overcome Petitioners' qualified immunity. The record does not indicate that the response was actually filed. [Appendix F]. Accordingly, Lugo filed the same response, attached to a motion for leave to file Plaintiff's response, on April 8, 1994 (R.I. 106-114). Lugo additionally responded to the other Defendants' motion to dismiss and further filed a motion for leave to file first amended petition [sic]. (R.I. 115-135).

---

[6]"R" refers to the record of the United States District Court, paginated for the Fifth Circuit appeal. The Roman numeral represents the volume, followed by the page numbers to that record.

On May 6, 1994, the District Court granted Lugo's request to amend his complaint and denied all motions to dismiss without prejudice to refiling, so Defendants could consider the amended complaint (R.I. 137-138). Lugo's First Amended Petition [sic] was filed on May 6, 1994. [Appendix G]. In Section XLI of his amended complaint, Lugo asserted in conclusory fashion that Petitioners, Reyes, Salinas, S. Garza, and De Leon

> "fired Plaintiff in retaliation for Plaintiff's non-support of the U.C.D. faction, i.e., patronage dismissal, that is for failing to support the prevailing political group."

Lugo asserted that "U.C.D." referred to "United Citizens For Donna," claimed to be one of several political groups existing in Donna, Texas. Further, Lugo provided in Sections XXV and XXIX, his personal beliefs that Petitioners were "U.C.D. allies," that "they would effect U.C.D.'s wishes," and that Reyes was "U.C.D. allied" and

> "wanted to effect Plaintiff's ouster as Executive Director and Secretary of the Donna Housing Authority." [Appendix G].

In Sections VI and VII of his amended complaint, Lugo states that he spoke to the City officials -- Ramirez, Hernandez, and Allison -- and particularly believes that City Manager Allison admitted that U.C.D. wanted him removed. Similarly, Lugo alleged that he spoke to a former commissioner of the Housing Authority, Adalberto Garza, who he believes told him essentially the same. [Appendix G].

Lugo ends his First Amendment allegations with two boilerplate statements in Sections XLII and XLVI of his amended complaint:

> "The action by these Defendants in firing Plaintiff as intended to deny and did deny Plaintiff his right to freedom of political belief and association which is protected by the First and Fourteenth Amendments to the United States Constitution and made actionable by 42 U.S.C. § 1983."
>
> ". . . Plaintiff believes that his employment with the Donna Housing Authority and thus, the City of Donna, was wrongfully severed because of Plaintiff's non-alliance with U.C.D. As a citizen of the State of Texas and of the United States, Plaintiff enjoys the right to freely associate himself with any or no political organization. Plaintiff believes that his termination for non-alliance violates the public policy of the State of Texas and such conduct on the part of the Donna Housing Authority and the City of Donna is actionable as wrongful discharge."

Regarding a denial of procedural due process claim under the Fourteenth Amendment, Lugo asserts in Section XXXVII that Petitioners, as a group,

> "refused to set a standard by which he was to be judged, despite the fact that an official standard was available."

He contends further,

> "he was not given an effective opportunity to rebut the allegations of ineffective management levied against him before his termination became procedurally effective."

Lugo concedes in his amended complaint that he was advised by Donna Housing Authority Board members of their intent to fire him, was provided in advance with notice of the hearing, was provided in advance with a list of the charges against him that would be discussed at the hearing, and admits that his termination was in fact the subject of a hearing held by the Donna Housing Authority Board of Commissioners at which he was present. [Appendix G].

Lugo's sole belief that a denial of liberty claim under the Fourteenth Amendment exists is his allegation that Reyes concluded Lugo's termination hearing with the statement that Lugo was fired "for ineffective management of the Donna Housing Authority complexes." [Appendix G].

Petitioners again moved to dismiss, with supporting brief, asserting the same contentions of Lugo's failure to comply with the heightened pleading requirement. [Appendix H and Appendix I].[7] Lugo again asserted that his pleadings were factually specific and sufficient. [Appendix J]. Subsequently, the Honorable Ricardo H. Hinojosa, District Judge, United States District Court For The Southern District Of Texas, after a hearing held on October 7, 1994, denied Petitioners' and other Defendants' motions to dismiss, without prejudice to refiling as a motion for summary judg-

---

[7]The City Defendants also moved to dismiss for failure to state a claim.

ment. This oral ruling was subsequently reflected in a minute entry of October 7, 1994 [Appendix B], which was entered on the District Court's docket on October 21, 1994. [Appendix K].

Petitioners filed their Notice Of Donna Housing Authority Defendants Of Pre-Trial Interlocutory Appeal To The United States Court Of Appeals, Fifth Circuit From The Order (Announced October 7, 1994, And Entered On The Docket October 21, 1994) Of The United States District Court For The Southern District Of Texas (McAllen) Denying Their Motion To Dismiss on October 28, 1994. [Appendix L]. As Judge Hinojosa had denied a Rule 12(b)(6) motion to dismiss that had asserted the qualified immunity defense of public officers and because Petitioners had filed their notice of appeal within thirty days, as required by F.R.A.P. 4(a), the Fifth Circuit had jurisdiction of Petitioners' appeal under 28 U.S.C. § 1291.

Petitioners' brief before the Fifth Circuit raised the issue of whether the United States District Judge erred, as a matter of law, in denying Petitioners' motion to dismiss, even though Lugo had made only conclusory allegations of constitutional violations and had failed to overcome Petitioners' qualified immunity defense. Petitioners asserted that the standard applicable to the motion to dismiss was the heightened pleading requirement adopted by Elliott v. Perez, 751 F.2d 472 (5th Cir. 1985).

The Fifth Circuit issued its opinion on September 28, 1995, dismissing Petitioners' appeal on the basis that the recent decision of Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995)(en banc), had abolished that part of the heightened pleading standard which

mandated that plaintiffs anticipate a qualified immunity defense in their complaint before discovery. [Appendix A]. Petitioners now appeal to this Court from the Fifth Circuit's September 28, 1995, opinion dismissing their appeal of the District Court's denial of their Rule 12(b)(6) motion.

ARGUMENT

The Fifth Circuit in this case, based on its recent en banc decision of Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995)(en banc), held that plaintiffs in § 1983 cases against public officials "need no longer anticipate a qualified immunity defense in the complaint," that defendant officials must raise the qualified immunity defense in their answer, which then triggers a discretionary decision by the District Court whether to order a reply, and that the case can proceed with the District Court considering any motions for summary judgment. [Appendix A]. This decision in effect abolishes the heightened pleading standard long recognized in federal civil rights cases and is the only decision of its type in the nation.

The Fifth Circuit's decision is in direct conflict with every federal circuit court that has addressed the heightened pleading standard. Specifically, nine circuit courts have adopted the heightened pleading standard. See, e.g., Hunter v. District Of Columbia, 943 F.2d 69, 76 (D.C. Cir. 1991); Oladeinde v. City Of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992), cert. denied, 113 S.Ct. 1586 (1993); Sawyer v. County Of Creek, 908 F.2d 663, 667 (10th Cir. 1990); Branch v. Tunnell, 937 F.2d 1382, 1386-87 (9th Cir. 1991); Brown v. Frey, 889 F.2d 159, 170 (8th Cir. 1989),

cert. denied, 493 U.S. 1088 (1990); Elliott v. Thomas, 937 F.2d 338, 344-45 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992); Chapman v. City Of Detroit, 808 F.2d 459, 465 (6th Cir. 1986); Dunbar Corp. v. Lindsey, 905 F.2d 754, 763 (4th Cir. 1990); Krohn v. United States, 742 F.2d 24, 31-32 (1st Cir. 1984).[8]

Although many of the important goals of the heightened pleading standard in § 1983 cases have expressly been adopted as pleading requirements by this Court in prior opinions for several years, this Court has never expressly ruled on the issue of whether the heightened pleading requirement, as expressed by prior Fifth Circuit law, is applicable to § 1983 cases involving public officials who raise the qualified immunity defense. As stated recently by this Court, "we thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." Leatherman v. Tarrant County Narcotics Intelligence & Coordination, 113 S.Ct. 1160 (1993). The present case now presents the occasion for a determination of the important federal question of whether plaintiffs in all federal courts will be required in federal civil rights cases against public officials in their individual capacities, to state their claim in accordance with the heightened pleading standard. Because the Fifth Circuit's ruling in this case departs from well-established law among the Circuits and from pleading requirements set forth by

---

[8]These cases were previously cited in support of this same conclusion by Justice Edith H. Jones of the Fifth Circuit in her concurring opinion in Schultea, 47 F.3d at 1434 f.n. 1.

this Court in prior opinions, the issue should be settled by this Court in this case.

Through this petition for writ of certiorari, Petitioners seek clarification that the heightened pleading requirement applies in all federal courts, so that plaintiffs in § 1983 cases against officials in their individual capacities, will be required to (1) state with factual detail and particularity the basis for their claim, (2) state facts showing why the defendant-official cannot successfully maintain the defense of immunity, and (3) overcome the defendant official's qualified immunity by specific facts prior to an answer by the official and prior to any discovery in the case.

A. Legal Basis For Granting The Petition

For almost two decades, this Court has recognized that in § 1983 civil rights cases against public officials in their individual capacities, plaintiffs are required to plead with factual specificity or have their case dismissed prior to discovery. In Butz v. Economou, 438 U.S. 478, 506 (1978), the Court emphasized that such a requirement was vital to advance a major goal:

> "We consider here, as we did in Scheuer, the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."

This Court noted that pleadings against public officials in § 1983 cases, if consisting of nothing more than conclusions, would be dismissed at the outset without resort to any type of discovery:

> "Insubstantial lawsuits can be quickly terminated by the federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss."

Butz, 438 U.S. at 507.

With the groundwork laid in Butz, this Court's decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982), dispelled all notions that notice pleadings under Fed.R.Civ.P. 8 would suffice in § 1983 claims of this type. Harlow accords to public officials qualified immunity if sued for actions taken in the performance of their official duties and as long as their conduct is not in violation of

> "clearly established statutory or constitutional rights of which a reasonable person would have known."

457 U.S. at 818. To protect against the abuses of subjecting public officials to frivolous lawsuits, Harlow, quoting Butz, specifically affirms that pleadings in these types of cases must be fact specific or plaintiff's complaint will be dismissed on the pleadings without resort to discovery. As stated by this Court,

> "bare allegations of malice should not suffice to subject government officials either to the costs of trial or the burdens of broad-reaching discovery."

457 U.S. at 817. More importantly, this Court in Harlow further provided that qualified immunity is to be determined as a

threshold matter before allowing any discovery. 457 U.S. at 818.

Harlow's principles of qualified immunity were correctly interpreted by the Fifth Circuit, in Elliott v. Perez, supra, as imposing a heightened pleading requirement on plaintiffs who asserted § 1983 claims against public officials. Under Elliott, plaintiffs were required to state in their complaint their claim "with factual detail and particularity" and to assert facts showing "why the defendant-official cannot successfully maintain the defense of immunity." Id. at 1473. In reference to Elliott's heightened pleading standard, this Court recently stated that it is "a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief." Leatherman, 122 L.Ed.2d at 523.

The practical effect of the heightened pleading standard is that conclusory and speculative pleadings are disallowed. Such a complaint will be dismissed as soon as it is evident from the pleadings that plaintiff has stated his best case prior to discovery. Consistent with Harlow, the Fifth Circuit, in Jacquez v. Procunier, 801 F.2d 789, 792 (5th Cir. 1986), stressed the importance of determining qualified immunity as a threshold matter:

> "If the protections afforded to public officials are not to ring hollow, plaintiffs cannot be allowed to continue to amend or supplement their pleading until they stumble upon a formula that carries them over the threshold."

In the present case, the Fifth Circuit, based on its recent en banc decision, abro-

gates all procedural safeguards of qualified immunity that have been established for public officials in § 1983 cases both by its prior opinions and by this Court in Butz, Harlow, and Mitchell. First, the Fifth Circuit's holding that plaintiffs need no longer anticipate a qualified immunity defense in their complaint [Appendix A] contravenes Butz's and Harlow's insistence that insubstantial lawsuits, based on "artful pleading," be "quickly terminated." Harlow, 457 U.S. at 814; Butz, 438 U.S. at 507-508. For qualified immunity to provide assurances against frivolous § 1983 lawsuits aimed at public officials, plaintiffs in such cases should still be required to anticipate the defense in their complaint. Since qualified immunity has been in federal jurisprudence for well over two decades, it should be no mystery to plaintiffs that a defendant-public official will demand specific pleadings that overcome the defense. Moreover, leaving the plaintiff with the option to state his or her specific facts after defendant's responsive pleading simply would invite protracted litigation, which would frustrate the very aim of Harlow to resolve the qualified immunity issue at the earliest possible stage of the case.

Second, the Fifth Circuit's rulings that the defendant-official must raise the qualified immunity defense in the answer and that the District Court may, in its discretion, order a reply tailored specifically to the issue of qualified immunity violate the same principles of Harlow and Butz that require analysis of the qualified immunity issue on the initial pleading by the plaintiff. In addition to the fact that all other circuit courts which have addressed the issue require factually-specific pleadings by the plaintiff to overcome defendant's qualified immunity, this Court

also has not shown disfavor with the heightened pleading standard. To the contrary, Justice Kennedy, concurring in Siegert v. Gilley, 500 U.S. 226, 236 (1991), supports the heightened pleading standard:

> "The heightened pleading standard is a necessary and appropriate accommodation . . . avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls . . . upon the assertion of a qualified immunity defense the plaintiff must put forth specific, nonconclusory factual allegations which establish malice, or face dismissal."

Third, the Fifth Circuit's holding that the District Court can proceed with discovery, without requiring adherence to the heightened pleading standard, and can consider summary judgment motions, is in direct violation of the holding of Harlow, that "until this threshold immunity question is resolved, discovery should not be allowed." Moreover, if District Courts are now allowed to wait until after substantial discovery and at the summary judgment stage to consider the qualified immunity defense, qualified immunity is essentially unavailable to defendant-officials during a substantial part of the litigation. Not only does such a ruling frustrate all established goals of qualified immunity in the several years that this Court has considered it, but also the ruling destroys the fundamental principle of qualified immunity in these types of cases which provides that public officials are not just merely immune from liability but immune

from suit altogether. Mitchell v. Forsyth, 472 U.S. 511, 526.

In sum, abolishment of the heightened pleading requirement, in violation of the holdings of Harlow, directly removes the reasonable expectation that public officials had, of securing the dismissal of frivolous lawsuits either immediately upon the filing of the suit or very early in litigation when it was clear that the plaintiff had stated his or her best case. More importantly, the Fifth Circuit's decision in this case, affirming the new procedural rules of Schultea, in effect creates confusion as to when a District Court would have the duty to dismiss frivolous federal claims based on qualified immunity. By making it discretionary for the District Court to order a reply and further making it discretionary for the District Court to dismiss it at that stage, the Fifth Circuit has created a situation where defendant-officials clearly will not be in a position to require the District Court to dismiss non-meritorious lawsuits prior to trial. As Justice Emilio M. Garza of the Fifth Circuit stated in his concurring opinion in Schultea,

> "Because the standards that once governed a plaintiff's allegations regarding qualified immunity will not apply to a plaintiff's reply, the majority must decide what rules, if any, govern the content of such a reply. The Court does not answer this question with an independent legal requirement against which District Courts can measure a plaintiff's allegations. . . . the majority's Rule 7 approach, however novel and interesting, raises more questions than it answers."

47 F.3d at 1437-1438.

The present case is precisely the type of "artful pleading" that Harlow required to be "quickly terminated." Unquestionably, Plaintiff's First Amended Petition [sic] [Appendix G] contains averments against Petitioners[9] regarding three federal claims that would not satisfy the heightened pleading standard. Respondent asserts a First Amendment claim that he was discharged in retaliation for his non-association with a group in Donna, Texas, called United Citizens for Donna (U.C.D.). The elements of Respondent's cause of action included the requirement that he plead facts to show (1) that he was discharged in retaliation for his political association, and (2) the protected activity was a substantial motivating factor of his discharge. Coughlin v. Lee, 946 F.2d 1152 (5th Cir. 1991). Respondent's amended complaint is completely bereft of any factual allegations showing that he participated in any type of political association. Respondent submits conclusory and speculative allegations that he must have been fired from his job for non-support of U.C.D. He does not allege any type of statements or conduct of Petitioners which would reflect impermissible retaliation. Respondent submits only his personal belief that Petitioners were "U.C.D. allies" and "they would affect U.C.D.'s wishes". Had the protections afforded public officials under Harlow and Elliott still been in effect at the time of the appeal in this case, clearly the denial

---

[9]There is no dispute that Petitioners, at all relevant times Commissioners of the Donna Housing Authority, a public entity, were entitled to assert the qualified immunity in their Rule 12(b)(6) motion.

of Petitioners' motion to dismiss would have been reversed and all claims of First Amendment violations would have been dismissed.

Similarly, Respondent alleges in conclusory fashion that he was denied procedural due process because allegedly Petitioners "refused to set a standard by which he was to be judged." Yet, due process is met when, as here, the employee is provided notice and opportunity to respond in a hearing that employs informal procedures. Soderstrum v. Town of Grand Isle, 925 F.2d 135 (5th Cir. 1991). Respondent, in his complaint, recognizes that he was provided advance notice of hearing, a list of charges, and an opportunity to respond at a hearing before being fired. His personal opinion that he was denied due process fails to overcome each of the Petitioner's qualified immunity and, but for the Fifth Circuit's dismissal of the appeal based on Schultea, all due process claims would have been dismissed.

Respondent's third federal claim is that at the conclusion of the hearing when he was discharged from employment, the chairperson, Petitioner Reyes, allegedly indicated that the Donna Housing Authority Board's decision was that he was fired for "ineffective management of the Donna Housing Authority complexes." The alleged statement is in the nature of an opinion or assessment rather than a "false assertion of wrongdoing," as required by Fifth Circuit law to sustain a denial of liberty interest claim under the Fourteenth Amendment. San Jacinto Savings & Loan v. Kacal, 928 F.2d 697, 701 (5th Cir. 1991). Clearly, but for the new procedural rules affirmed in this case, these claims would have also been dismissed on the basis that they failed to overcome each Petitioner's qualified immunity.

Petitioners respectfully submit that if the Fifth Circuit's decision in this case is allowed to stand, Petitioners unjustly will be required to defend federal claims when qualified immunity principles under Harlow would have appropriately required dismissal. Petitioners seek the right to enjoy the rulings of Harlow, as available to all other circuits. The Fifth Circuit's new procedural rules for qualified immunity in this case should be reversed.

B. Practical Reasons For Granting The Petition

The practical reasons for granting this petition are firmly established by Harlow itself and the circumstances still necessitate these same safeguards that were provided. Harlow expressly recognized that qualified immunity was necessary in § 1983 cases against public officials to contain certain "social costs," such as expenses of litigation." 474 U.S. at 814. If allowed to stand, the Fifth Circuit's decision in this case undoubtedly will substantially increase litigation expenses. No longer is a public official guaranteed that he or she can minimize costs when sued under § 1983 by obtaining dismissal of frivolous claims as a threshold matter. The decision in effect extinguishes the right of qualified immunity before the summary judgment stage, which typically is at the end of discovery. Since District Courts have the discretion to order a reply and proceed with discovery, Harlow's insistence of a determination of the qualified immunity at the earliest stage and before discovery is thwarted. Moreover, since a District Court generally has the discretion to reserve ruling on a motion for summary judgment until time of trial, conceivably qualified immunity could be effectively lost altogether by the District Court

simply ruling on that issue at time of trial. It is well established that qualified immunity is lost if the case is allowed to go to trial.

Second, allowing frivolous suits to proceed through discovery will "divert official energy from oppressing public issues," another goal of Harlow. 474 U.S. at 814. With the propensity in this nation for litigation of frivolous claims and with the overcrowded dockets of federal courts, the distraction from official duties and resulting slowdown in the important work of government resulting from long pending and over-litigated lawsuits is more realistic and probable today than it was in Harlow.

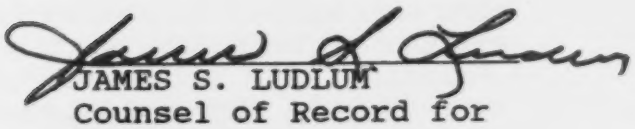
Third, the new decision of the Fifth Circuit will deter able citizens from accepting public office, another goal of Harlow. 474 U.S. at 814. Skilled public officials, without protections afforded by qualified immunity, will find employment in the private sector more advantageous.

Finally, if the qualified immunity protections of Harlow are not afforded to public officials, litigation defense costs and expenses will be escalated and a waste of judicial economy will result. Needless discovery, preparation for trial and trial will occur in cases to achieve the same result of dismissal as would have occurred at the Rule 12(b)(6) stage with the heightened pleading standard. Moreover, to have the Fifth Circuit and the rest of the circuits in this nation split on the important purposes of Harlow will invite confusion in the decisions of the courts and uncertainty as to the exact standards that will apply to plaintiffs' § 1983 complaints, and this is the very type of situation that warrants review by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



JAMES S. LUDLUM
Counsel of Record for
Petitioners
ANTHONY G. BROCATO, JR.
LUDLUM & LUDLUM
13915 Burnet Road
Second Floor
Austin, Texas 78728
(512) 255-4000